Supreme Court, U.S.
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No. 91-551

IN THE
SUPREME COURT OF THE UNITED STATES
JULY TERM, 1991

NORMAN DAVIS,
Petitioner

v.

KAMBARA KISEN, CO., LTD.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the Third Circuit, granting Defendant's Motion for Summary Judgment when genuine issues of material fact remain in dispute, is inconsistent with the standard for ruling on motions for summary judgment under Rule 56(c) as enunciated by this Court in Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Adickes vs. S.H. Kress & Co., 398 U.S. 144 (1970); and Matsushita Electric Industrial Company vs. Zenith Radio Corp., 475 U.S. 574, 588 (1985)?

2. Whether the decision of the Third Circuit, holding that a shipowner did not know of the defect in the ship equipment, is inconsistent with Scindia Steam Navigation Co., Ltd. vs. De Los Santos, 451 U.S. 156 (1981) and Harris vs. Flota Mercante Grancolombiana, S.A., 730 F.2d 296, 299 (5th Cir. 1984), when the shipowner failed to inform itself of unknown dangers and should have known of those dangers in the exercise of reasonable care?

3. Whether the Third Circuit's reliance on Derr v. Kawaski Kisen K.K., 835 F.2d 490, 493 (3d Cir. 1987), CERT DENIED, 486 U.S. 1007 (1988), in holding that a vessel has no duty to supervise a stevedore's work under the facts of this case implicitly recognizes that a shipowner is not liable for the negligence of a foreign or independent stevedoring company, is misplaced, given the differing standards in practice in foreign countries?

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v.

KAMBARA KISEN CO., LTD.

PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE THIRD CIRCUIT

Simon W. Tache, P.C., Esquires, on behalf of Norman Davis, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

DECISIONS BELOW

The judgment order of the Court of Appeals for the Third Circuit (Appendix A) summarily affirming the decision of the District Court and denying petitioner's motion for a hearing en banc (Appendix B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. A motion for rehearing en banc was denied on March 12, 1991. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PROVISIONS OF RULE OF CIVIL PROCEDURE INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> Motions and Proceedings Thereon...the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

STATEMENT

1. On November 17, 1987, Plaintiff, a longshoreman, was engaged in the discharge of cocoa beans aboard the Defendant's vessel, when he suddenly dropped through the hatch covers of the M/V "Rio de la Plata".

2. The vessel was carrying a cargo of cocoa beans, loaded in the Republic of the Ivory Coast.

3. The vessel's crew swept and cleaned the cargo space in preparation for receipt of cargo in the Republic of the Ivory Coast.

4. SIVOM was the foreign longshore company that loaded the vessel in the Republic of the Ivory Coast.

5. SIVOM's involvement was limited to conducting loading operations from under tackle to stowage on board the vessel.

6. SIVOM loaded the cargo into the holds of the ship spaces reserved and prepared by its crew.

7. SIVOM did not remove the hatchboards because they had

no reason to do so.

8. SIVOM neither replaced nor supplied the vessel with hatchboards.

9. The hatchboards in question belonged and were supplied by the ship.

10. At the time of injury, there was open spacing between hatchboards; however, the open spaces were covered by brown papers and were unknown and invisible to the Plaintiff.

11. As a result of the fall, Plaintiff suffered personal injuries.

12. On February 28, 1989, Plaintiff brought this action against the Defendant for the injuries he suffered.

13. The Plaintiff's employer, a Philadelphia-based longshore company, had no involvement in the supply and/or position of the hatchboards aboard the vessel. The vessel had been loaded in the foreign country of the Ivory Coast.

14. On December 15, 1989, Defendant filed a Motion for Summary Judgment and requested oral argument pursuant to Local Rule 20(f).

15. In support of the Motion, Defendant attached an Affidavit allegedly executed by Captain Oscar Lebel_____

16. The Plaintiff demurred Defendant's Motion for Summary Judgment and raised the defense of pre-loading inspection.

17. Recognizing the validity of Plaintiff's defense, Defendant, on January 26, 1990, supplied the Lower Court with a supplemental affidavit, allegedly executed by the Captain.

18. The Plaintiff attacked the validity, authenticity and veracity of this Affidavit and moved for leave of court to depose the Captain.

19. On June 11, 1990, Plaintiff countered the Captain's alleged Supplemental Affidavit with the Affidavit of Mr. Cochennec, the Director of Operations of the foreign longshore company that loaded the vessel in the Republic of the Ivory Coast.

20. Relying on the unsworn Affidavits of the Defendant, the District Court granted Defendant's Motion for Summary Judgment.

21. On August 8, 1990, Plaintiff appealed the ruling of the Lower Court.

22. On January 30, 1991, the Third Circuit Court of Appeals affirmed the judgment of the District Court.

23. On February 13, 1991, Plaintiff filed a Petition for Rehearing En Banc.

24. On March 12, 1991, the Third Circuit Court of Appeals denied Plaintiff's Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

A. The decision of the Third Circuit, granting Defendant's Motion for Summary Judgment when genuine issues of material fact remain in dispute, is inconsistent with the standard for ruling on motions for summary judgment under Rule 56(c), as enunciated by this Court in Anderson vs. Liberty Lobby, Inc., 477, U.S. 242, 248 (1986); Adickes vs. S.H. Kress & Co., 398 U.S. 144 (1970); and Matsushita Electric Industrial Company vs. Zenith Radio Corp., 475 U.S. 574, 588 (1985).

1. The applicable standard.

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> Motions and Proceedings Thereon...the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

This Court has consistently held that a Motion for Summary Judgment under Rule 56(c) will not lie unless there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Anderson vs. Liberty Lobby, Inc., 477,

U.S. 242, 248 (1896); Ettinger vs. Johnson, 556 F.2d 692, 696 (3d Cir. 1977); and Adickes vs. S. H. Kress & Co., 398 U.S. 144 (1970). This Court further stressed that in making this determination, inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. Matsushita Electric Industrial Company vs. Zenith Radio Corp., 475 U.S. 574, 588 (1985).

The decision of the Third Circuit in the case at bar is inconsistent and in conflict with the standard enunciated by this Court in the cases cited above. In granting the Defendant's Motion for Summary Judgment, the District Court relied on unsworn affidavits by the Captain. The facts contained in the affidavits allegedly executed by Captain Oscar Lebel are contradicted by the duly executed Affidavit of Mr. R. Cochennec, the Director of Operations of SIVOM, the foreign longshore company.

The Lower Court stated in its Memorandum Opinion that:

> Since the Plaintiff has failed to provide any evidence to contradict Captain Lebel's statement, the Court must conclude that the statement is correct, and that the Defendant did not know of the allegedly defective condition aboard the vessel prior to the time of Plaintiff's accident.

Yet, the record clearly shows that the Plaintiff submitted a duly executed Affidavit by Mr. Cochennec. In his Affidavit, after giving in detail the tonnage loaded aboard the vessel in the Republic of the Ivory Coast, Mr. Cochennec continued:

> The allegations of the ship's Captain, seeking to have SIVOM assume liability for damages, which I presume led to a trial, are unfounded and appear completely false since:

- Our involvement was limited to that of stevedore in charge of conducting loading operations from 'under tackle to stowage onboard of the cargo described above'.

- We loaded the cargo into the holds of the ship into the spaces reserved and prepared by its crew.

- We did not move the hatchboard covers.

- We neither replaced nor supplied the vessel with the hatchboards.

- This function is the responsibility of the ship's crew, and not that of SIVOM.[1]

On this record, it appears that the Lower Court did not consider Mr. Cochennec's Affidavit. Mr. Cochennec is emphatic and maintains that the only thing the foreign stevedoring company did was land the cargo aboard the vessel. They had nothing whatsoever to do with the preparation of the space to receive the cargo.

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[1] For reasons which the Plaintiff cannot explain, the Court ignores the Affidavit of Mr. Cochennec and relies on a comment made by Judge Waldman in the companion case of Thomas vs. Kambara Kisen Ltd., No. 88-7243 (E.D.Pa. April 11, 1990). Plaintiff can only conclude that the Judge in the instant case had been so influenced by the rulings of Judge Waldman, which were being transmitted to him by defense counsel despite objections by the Plaintiff, that the Lower Court decided to ignore this competent and effective evidence.

In fact, the Defendant's own supplemental affidavit, Paragraph 3, states:

> After the cargo of rice was discharged by the stevedore in Senegal, the vessel's crew swept the holds of the vessel's hatches to prepare for the loading of the coffee cargo in the Ivory Coast.

This stated fact by the Captain of the vessel clearly supports the Affidavit of Mr. Cochennec, and impeaches all other statements of the Captain to the contrary. It was, therefore, error for the Lower Court to conclude that the statements of the Captain were true and that the Plaintiff had offered no evidence to contradict those statements.

As this Court has clearly pointed out in Anderson, supra, at the summary judgment stage, the Judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. The question here is whether a jury could reasonably find that either the Plaintiff proved his case by the quantity and quality of evidence required by governing law or that he did not. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Id., at 255.

Defendant in the case at bar did not meet its burden because the affidavits of the Captain failed to foreclose the possibility that:

a) A routine inspection of each hatch was not conducted prior to the actual loading of each hatch level. In effect, even if the Captain and the Mate had conducted the initial inspection for the preparation of the space, the affidavit does not show that a subsequent inspection of the prepared space was conducted prior to loading of the space.

b) Under the laws and customary practice of the Ivory Coast, the master of the vessel is responsible for the loading operations aboard his ship at all times.

c) Even if the Captain had conducted the inspection of the loading space, a failure to test the hatchboards to determine the effectiveness of those boards prior to their use was negligence.

d) The boards were already defective when the shipowner turned the vessel over to the foreign longshoremen for preparation to load cargo.

e) These possibilities could lead a reasonable jury to conclude that the Plaintiff could sustain its burden by relying on the doctrine of Res Ipsa Loquitor.

Indeed, this Court in Adickes, ruled that given the unexplained gaps in the material submitted by the respondent, it failed to fulfill its initial burden of demonstrating that the Motion for Summary Judgment was proper. This Court went on to state that because on summary judgment the inferences to be drawn from the underlying facts contained in the moving party's materials must be viewed in the light most favorable to the party opposing the motion, the respondent's failure to preclude all possibilities of liability was fatal to the grant of motion for summary judgment. Id., at 157.

Similarly, the affidavit of the Captain is clearly impeached by the affidavit of the Director of the foreign stevedoring company and, as indicated above, the Defendant's evidence and the record as a whole fail to show that the hatchboards were not defective when the Defendant ordered that they be used to receive cargo for ocean trade. In fact, this Court emphasized that where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. Id., at 159-161.

In fact, even the Third Circuit in Ettinger vs. Johnson, supra., held that:

> When at the hearing on a motion for summary judgment there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be

> believed by reasonable minds. The evidence contradicting or impeaching that of the movant will usually be produced by the opposing party, but it may appear in the movant's own evidentiary materials. Id. at 696.

Yet, this standard was not applied in the case at bar, even though the record clearly shows that the Defendant's own evidence is not only contradicting, but was clearly impeached by the Plaintiff's evidence. Therefore, the decision of the Third Circuit should be reversed.

B. The decision of the Third Circuit, holding that a shipowner did not know of the defect in the ship equipment, is inconsistent with Scindia Steam Navigation Co., Ltd. vs. De Los Santos, 451 U.S. 156 (1981) and Harris vs. Flota Mercante Grancolombiana, S.A., 730 F.2d 296, 299 (5th Cir. 1984), when the shipowner failed to inform itself of unknown dangers and should have known of those dangers in the exercise of reasonable care.

1. Scindia imposes a duty upon a shipowner to inform itself of unknown dangers.

This Court in Scindia stated that:

> The vessel owner must turn over the ship and its equipment in such condition that an expert and experienced stevedore would be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warn the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care that

> would likely be encountered by the stevedore in the course of cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. (Emphasis added) Id., at 164.

The Scindia Court recognized that a shipowner has a duty to initially provide the longshoreman with a safe place to work, by warning the stevedore of hazards on the ship or with respect to the condition of its equipment that are known or should be known in the exercise of reasonable care. Harris vs. Flota Mercante Grancolombiana, S.A., 730 F.2d 296, 299 (5th Cir. 1984); Samuels vs. Empresa Lineas Maritimas Argintenas, 573 F.2d 884 (5th Cir. 1978) and re-hearing 579 F.2d 643 (5th Cir. Cert. Den'd 99 S.Ct. 3106).

In affirming the decision of the Lower Court, the Third Circuit necessarily agreed with the Lower Court's finding that the Defendant did not know of the defective condition aboard the vessel prior to the time of Plaintiff's injury. This conclusion is erroneous in that not only is it inconsistent with the record, but it truncates the controlling law as enunciated by this Court in Scindia. The test is not whether the Defendant knew, but whether in the exercise of reasonable care, it should have known of the defective condition that caused the Plaintiff's injury. In effect, the Defendant is under the duty to inform itself of unknown dangers which would be discoverable through mere inspection. Id., at 157. The record clearly establishes that the Defendant should have known that its hatchboards were missing or defective prior to the vessel departing the Republic of the Ivory Coast for Philadelphia.

C. The Third Circuit's reliance on Derr v. Kawaski Kisen K.K., 835 F.2d 490, 493 (3d Cir. 1987), CERT DENIED, 486 U.S. 1007 (1988), in holding that a vessel has no duty to supervise a stevedore's work under the facts of this case implicitly

recognizes that a shipowner is not liable for the negligence of a foreign or independent stevedoring company, is misplaced, given the differing standards in practice in foreign countries.

The Derr court held that a vessel has no duty to supervise a stevedore's work and therefore cannot be held liable for injuries caused by the stevedore's negligence. There is no evidence in the record that the Plaintiff was negligent in his duty with respect to the discharge of cargo aboard the vessel.

On the contrary, there is evidence that the missing hatchboards were covered by separation paper. The paper was opaque and was not transparent, so the Plaintiff could not see through he paper. The Plaintiff's longshore company was not involved in the preparation of the cargo space, and did nothing to modify the condition of the cargo space. The cargo space was in the same condition as turned over to the Plaintiff's longshore company by the Defendant. The foreign longshore company denies any involvement in the preparation of the cargo space. It was not the cargo being discharged that injured the Plaintiff, but rather a latent or defective condition that was concealed aboard the Defendant's vessel, which a mere inspection would have discovered. Therefore, Derr is not only inapplicable but clearly distinguishable from the case at bar.

The Third Circuit's decision in the case at bar implicitly recognizes the Derr principle that a shipowner is not liable for the negligence of a foreign or independent stevedoring company. Id. at 493. This position is justified when the independent stevedoring company is American. An American stevedoring company would be familiar with American law, custom and practices. The same cannot be said of a foreign stevedoring company where there may or may not be comparable standards. In order to extend the Derr principle to foreign stevedoring companies, there must be a showing of similar training, facilities, customs and practices.

Derr poses some troubling concerns to the American longshore

worker. Most maritime countries of the world impose a general duty upon the crew of the vessel to monitor the operations of the longshoremen irrespective of the experience and expertise of the longshoremen. As such, a vessel loaded in a foreign port is assumed by the foreign longshoremen to be supervised by the crew. The assumption is that if there was an error in the cargo operations on the part of the longshoremen, the crew would intervene. By relieving the crew of the general duty to supervise the work of the stevedoring employees or to prevent development of dangerous conditions within the area of the cargo operations under the exclusive control of the stevedore, absent contract provisions, positive law or custom to the contrary, the United States longshore worker may become a victim of deficient longshore practices in foreign ports. It seems logical to apply this principle to vessels loaded within the confines of U.S. territory, where the standards may be deemed or assumed equal, and not foreign countries, where the standards, positive law and/or custom are different.

Therefore, to apply Derr without inquiry into the law of the State of the foreign stevedoring company is a source of conflicts with international law or laws of other nations and subjects the safety of the American longshoreman to precarious and unpredictable foreign standards.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SIMON W. TACHE, P.C.

By: _____
Simon W. Tache

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1587

DAVIS, NORMAN,
APPELLANT

v.

BELGIAN LINES,
KUSA PANAMA, S.A.
KAMBARA KISEN CO., LTD.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 88-07245)
(District Judge: Honorable Joseph L. McGlynn)

Submitted Under Third Circuit Rule 12(6)
January 22, 1991

Before: BECKER, HUTCHINSON, Circuit Judges
and SMITH, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

_____

Circuit Judge /s/

ATTEST:

_____

Sally Mrvos, Clerk /s/

DATED: JAN 30 1991

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*The Honorable D. Brooks, Smith, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1587

NORMAN DAVIS,
APPELLANT

v.

BELGIAN LINES, USA PANAMA, S.A.,
KAMBARA KISEN CO., LTD.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

PRESENT: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
and ALITO, Circuit Judges, and SMITH, District Judge*

The petition for rehearing filed by Appellant Norman Davis, having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

*. The Honorable D. Brooks Smith, United States District Judge for the Western District of Pennsylvania, sitting by designation, as to panel rehearing only.

BY THE COURT:

Circuit Judge /s/

DATED: Mar 12 1991

13B1

ENTERED: 8/1/90 FILED JUL 31 1990
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN DAVIS	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 88-7245
KAMBARA KISEN CO.	:	

MEMORANDUM OF DECISION

McGLYNN, J. JULY 31, 1990

Plaintiff, Norman Davis, instituted this maritime action against defendant, Kambara Kisen Co., Ltd., owner in possession of the M/V RIO DE LA PLATA, pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. Sec. 905(b), to recover damages arising from an alleged personal injury sustained on November 17, 1987, during the course of plaintiff's employment as a holdman for the Delaware Operating Company ("DOC"). Plaintiff alleges that he sustained serious injuries while unloading cargo aboard the M/V RIO DE LA PLATA due to the unsafe condition of the vessel and the defendant's negligence. Defendant contends that it had no knowledge of any hazardous conditions aboard the vessel and therefore it is not negligent under the LHWCA. Both parties have moved for summary judgment.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). This court is required, in resolving a motion for summary judgment, to

determine whether a dispute about a material fact is "genuine," that is, whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material issue of fact is one which may affect the outcome of the litigation. Tarasi v. Pittsburgh National Bank, 555 F.2d 1152, 1156 (3d Cir. 1977), cert. denied, 434 U.S. 965 (1977).

At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. However, if the evidence presented by the nonmoving party is merely colorable or not significantly probative, summary judgment may not be granted. Id. at 249-50. Furthermore, if plaintiff is not able to oppose defendant's motion for summary judgment as required by Rule 56(e) "on personal knowledge," plaintiff "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." Delong Corp. v. Raymond International, Inc., 622 F.2d 1135, 1139 (3d Cir. 1980). Therefore, while the moving party bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The court has utilized these standards in evaluating the parties' motions for summary judgment, and for the reasons stated below, defendant's motion for summary judgment will be granted and plaintiff's motion will be denied. The court will first address defendant's motion for summary judgment.

I. BACKGROUND

The record reveals the following facts. In October and November of 1987, the M/V RIO DE LA PLATA called at the ports of Abidjan and San Pedro in the Ivory Coast to load bagged cocoa, bagged coffee and containers for discharge in the United States at the ports of Philadelphia, Norfolk and New Orleans. This cargo was loaded aboard the vessel by the Societe Ivoirienne De Manvtention ("SIVOM"), a stevedore who was hired by the vessel's charterer, Belgian Lines. SIVOM and its employees, the longshoremen, handled all the details of the cargo loading operations in Abidjan and San Pedro, including the removal, positioning, and replacement of the wooden hatch boards in the tween and lower decks of the vessel's cargo holds.

During the cargo operations in Abidjan and San Pedro, SIVOM loaded the bagged cocoa in the lower tween deck of hatch No.1. Upon completion of the loading, SIVOM and its longshoremen replaced and positioned the hatch boards. At this time, SIVOM did not report any spaces between hatch boards, or missing boards, to the vessel's officers. SIVOM also loaded bagged cocoa in the No.1 hatch upper tween deck; but before this cargo was loaded, SIVOM placed paper on the deck to prevent moisture damage to the cargo.

The M/V RIO DE LA PLATA arrived in Philadelphia on November 15, 1987 to unload cargo. DOC and its employees, the longshoremen, handled the cargo unloading operations in Philadelphia; they began unlaoding the cargo on November 15, 1987, and finished the cargo work on November 17, 1987. Plaintiff, a DOC employee, was a holdman in the longshore gang which worked the Nos. 1, 2, and 3 hatches of the vessel.

Plaintiff contends that on November 17, 1987, he and his breaster were dragging an empty pallet in the hatch square when plaintiff stepped on paper and fell between a space in the hatch boards of the No.1 upper tween deck. Plaintiff also alleges that as a result of this incident he suffered serious injuries, and that these injuries "were caused solely by the vessel's unsafe condition

and/or the negligence of its master and crew and were in no way due to any act or failure to act on the part of the plaintiff." Amended Complaint, Para. 8. Defendant argues, on the other hand, that during the cargo operations conducted aboard the MV RIO DE LA PLATA in Philadelphia, DOC made no complaints to the vessel regarding spaces between hatch boards, or missing hatch boards, in hatch No.1 of the vessel. Defendant submits, therefore, that it cannot be found negligent under the LWHWCA, because the vessel had no knowledge of a dangerous condition in the vessel's No.1 hatch. Scindia Steam Navigation Co. Ltd. v. De Los Santos, 451 U.S. 156 (1981). Instead, the defendant asserts that it had a right to rely on the loading and discharging stevedores to conduct the cargo operations in a safe and workmanlike manner. Derr v. Kawaski Kisen K.K., 835 F.2d 490, 493 (3d Cir. 1987), cert. denied, 486 U.S. 1007 (1988). If there was any negligence in the present case, argues defendant, it was that of the stevedores,1 and the vessel cannot be held vicariously liable for the stevedores' negligence. Bielicki v. Pakistan National Shipping Corp., et al., No. 88-1203 (3d Cir. Aug. 26, 1988).

Prior to 1972, a longshoreman injured while unloading a ship was eligible to receive both compensation payments and a damage judgment against the shipowner if his injury was caused by either the ship's negligence or by the negligence of the stevedores. As a result of the 1972 amendments to the LHWCA, however, an injured longshoreman may no longer hold a vessel strictly liable for an unseaworthy condition that is injurious, but instead can recover damages against a shipowner only upon a

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1. Defendant asserts that the plaintiff's employer, DOC, failed to follow the OSHA regulations for longshoring which require removal of paper from a vessel's deck as cargo is unloaded. This failure, argues defendant, cannot be the basis for imposing liability on the vessel in the present case, since defendant was unaware of DOC'sfailure to perform its job properly.

showing of the vessel's negligence. 33 U.S.C. Sec. 905(b).2 Along with the LHWCA, the liability scheme that exists with respect to longshoremen, stevedore employers and vessel owners is governed by the Supreme Court's decision in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981). In Scindia, the Court established a specific standard of due care owned by a vessel to stevedore employees:

> We are of the view that absent contract provision, positive law, or custom to the contrary... the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the

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2. Section 905(b) provides, in pertinent part:

> In the event of injury to a [longshoreman] caused by the negligence of a vessel, then such [longshoreman]... may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer [the stevedore] shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.... The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

33 U.S.C. Section 905(b).

> shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to forclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.

Id. at 172.

As a result of the Scindia decision, the Third Circuit in Derr v. Kawaski Kisen K.K., 835 F.2d 490, 493 (3d Cir. 1987), cert denied, 486 U.S. 1007 (1988), held that a vessel has no duty to supervise a stevedore's work and therefore cannot be held liable for injuries caused by the stevedore's negligence. In Derr, the plaintiffs were injured while unloading cargo when the cargo fell because of alleged improper loading by a foreign stevedore. The District court granted a directed verdict for the vessel and the Court of Appeals affirmed, ruling that:

> Scindia compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [of] the stevedore's failure to perform his job properly.

Id. at 493. See also Bielicki v. Pakistant National Shipping Corp., et al., No. 88-1203 (3d Cir. Aug. 26, 1988) (vessel has no duty to

supervise the stevedores' work and cannot be held liable for injuries caused by a stevedore's negligence). The Derr court also noted, however, that the shipowner may have a duty to intervene "where the danger to the longshoremen arises from the malfunctioning of the ship's gear being used in cargo operations." Id. at 496 (citing Scindia, 451 U.S. at 175). The Third Circuit stated that this general duty extends to the ship's gear, equipment, tools and workspace to be used in stevedoring operations. Id. This duty, however, exists only where the owner knew of the danger, knew that the stevedore was continuing to use the workspace or equipment, and knew that such continued use was "obviously improvident." Scindia, 451 U.S. at 175. Further, although the shipowner has a duty to intervene to make repairs with respect to the ship, its equipment, and gear, since the ship has no duty to inspect the cargo handling operations or the stowed cargo, there is ordinarily no duty to intervene to remedy dangers created by negligently loaded cargo. Derr, 835 F.2d at 496.

In the present case, defendant alleges that it had no knowledge of any hazardous conditions aboard the vessel or knowledge that the loading or discharging stevedores had performed their jobs improperly, and therefore defendant is entitled to summary judgment as a matter of law. Scindia, 451 U.S. at 172. In support of its motion for summary judgment, the defendant offers, inter alia, the affidavit of Captain Oscar Lebel. Captain Lebel was the master of the M/V RIO DE LA PLATA in November of 1987 when the vessel loaded cargo in Abidjan and San Pedro for discharge at the port of Philadelphia. In his affidavit,3 Captain Lebel states, in pertinent part:

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3. Plaintiff submits that Captain Lebel's affidavit is defective under Federal Rules of Evidence, Rule 902(3), and therefore, defendant's motion for summary judgment should be denied. In Thomas v. Kambara Kisen Co. Ltd., No. 88-7243 (E.D. Pa. Apr. 11, 1990),

> During the cargo operations in Abidjan and San Pedro, SIVOM loaded bags of cocoa beans in the lower tween deck of hatch No. 1. The task of placing and positioning the hatch boards in the upper tween deck of hatch No.1 was performed by SIVOM and its longshoremen without any required supervision by the vessel's crew. SIVOM did not report any problems with spaces between hatch boards, or missing hatch boards, in any of the ship's cargo holds to the vessel's officers. Delaware River Stevedores and its employees, the longshoremen, hauled all the details of cargo unloading operations in Philadelphia, including the removal, positioning and replacement of the wooden hatch boards in the tween and lower decks of the vessel's holds. During cargo unloading operations in

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3. continued

Judge Waldman addressed a similar argument. In Thomas, a Longshoremen's and Harbor Workers' Compensation Act case, the court granted defendant's motion for summary judgment due to plaintiff's failure to demonstrate a genuine issue of material fact through affidavits, deposition testimony, and admissions on file. Id. Plaintiff then filed a motion for reconsideration to which Judge Waldman responded:

> The apparent basis for this motion was plaintiff's misapprehension that a party could challenge the accuracy of an affidavit by citing to a provision of the Federal Rules of Evidence relating to authenticity.

Id. This court likewise finds that Captain Lebel's affidavit is not defective under Rule 902(3).

> Philadelphia, the stevedore made no complaints to, or requested remedial action from, the vessel about spaces between hatch boards, or missing hatch boards, in hatch No.1 of the M/V RIO DE LA PLATA. Therefore, neither the ship's officers nor myself had any knowledge of any spaces between hatch boards, or missing hatch boards, in the No.1 hatch of the M/V RIO DE LA PLATA.

(Affidavit of Captain Oscar Lebel; Exhibit 24). Since the plaintiff has failed to provide any evidence to contradict

Captain Lebel's statement,4 the court must conclude that the statement is correct, and that the defendant did not know of the allegedly defective condition aboard the vessel prior to the time of plaintiff's accident.

Plaintiff asserts that the present case is not one of improper stowage or negligent loading operations by a stevedoring company. Instead, plaintiff argues that this is a case where the defendant breached its initial duty to inspect and provide the vessel with sufficient and effective hatch boards, and therefore the vessel was negligent. In support of his position, plaintiff cites to the case of Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296, 299 (5th Cir. 1984). In Harris, the plaintiff was injured on defendant's vessel while unloading sacks of coffee from the vessel's hold. Id. at 299. The court held, therefore, that a jury could have found that defendant was negligent, and reversed the lower court's decision to take the case from the jury. Id. at 300.

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4. The only evidence plaintiff offers in an attempt to contradict Captain Lebel's affidavit is the statement of Rene Cochennec, the Director of Operations for SIVOM. However, Mr. Cochennec's

The court also stated, however, that, in general, a "shipowner's liability for damages arising from a dangerous stow is limited to situations where the shipowner knew or should have known of the dangerous condition." Id. at 299. If the shipowner reasonably has no knowledge of a dangerous condition created by a stevedore's loading operations, the owner may escape liability. Id. at 299 n.2.

In the present case, unlike Harris, the plaintiff fails to offer any evidence that defendant knew or should have known of the allegedly dangerous condition aboard the M/V RIO DE LA PLATA. Additionally, since there is no evidence to indicate that defendant was aware of any spaces between hatch boards or missing hatch boards in the No. 1 hatch, defendant cannot be held liable for a failure to intervene and make repairs. Scindia, 451 U.S. at 175. In fact, plaintiff's evidence establishes only that plaintiff was injured aboard the M/V RIO DE LA PLATA on November 17, 1987, while he was dragging an empty pallet in the hatch square and he allegedly stepped on paper which covered a space in the hatch boards of the No. 1 hatch upper tween deck. Other than establishing those facts, plaintiff's answer and supplemental answers to defendant's motion for summary judgment simply state legal conclusions and make factual allegations which are not supported by any testimony, affidavits or discovery documents. Plaintiff's evidence, therefore, is insufficient as a matter of law to establish defendant's liability because it proves only "an unsafe injury-causing condition on the vessel."

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4. continued

affidavit fails to offer any evidence that the vessel created or had any knowledge of the allegedly missing hatch boards prior to plaintiff's injury. Instead, Mr. Cochennec's statement contains, for the most part, totally irrelevant information and conclusory statements of law. See Thomas v. Kambara Kisen Co. Ltd., No. 88-7243 (E.D. Pa. Apr. 11, 1990).

Scindia, 451 U.S. at 164. See also Garofalo v. Malaysia Overseas Export Lines, Inc., 470 F. Supp. 166 (S.D.N.Y. 1979) (court granted vessel's motion for directed verdict because there was no evidence of vessel's knowledge of alleged hazardous condition - a missing hatch board). Accordingly, since plaintiff has failed to prove a prima facie case of vessel negligence under the LHWCA, there is no genuine issue of material fact, and defendant's motion for summary judgment will be granted. Furthermore, due to the court's finding that defendant was unaware of any hazardous conditions aboard the vessel, plaintiff's motion for summary judgment made on the basis of the doctrine of Res Ipsa Loquitor5 will be denied.

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5. The court cannot find, for reasons already stated, that the hatch boards which allegedly caused plaintiff's injury were within the exclusive control of the defendant.

13B12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN DAVIS	:	
	:	CIVIL ACTION
v.	:	
	:	No. 88-7245
KAMBARA KISEN CO., LTD.	:	

ORDER

AND NOW, this 31st day of July, 1990, upon consideration of the parties' motions for summary judgment, it is

ORDERED

that defendant's motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

BY THE COURT

_____/s/
JOSEPH L. McGLYNN, JR.
J.

IN THE
SUPREME COURT OF THE UNITED STATES

JULY TERM, 1991

NO.

NORMAN DAVIS,

PETITIONER

V.

KAMBARA KISEN CO., LTD.

PROOF OF SERVICE

Simon W. Tache, Esquire, hereby certifies that three true and correct copies of the within Petition for Writ of Certiorari were served upon all counsel by first-class mail, postage pre-paid this 30 day of September, 1991, as follows:

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